

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW DUNN ELLIS,

Defendant-Appellant.

UNPUBLISHED

May 8, 2008

No. 273535

Genesee Circuit Court

LC No. 05-016638-FH

Before: White, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from his sentence for his plea-based conviction of second-degree home invasion, MCL 750.110a(3). We vacate defendant's sentence and remand for resentencing.

The plea agreement included downgrading the home-invasion charge from first to second degree, and dismissal of a charge of assaulting or obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant as a habitual offender third, MCL 769.11, to 20 to 30 years in prison. In doing so, the court exceeded the recommended range for defendant's minimum sentence under the sentencing guidelines.

I. Facts

This case arises from an incident that took place in Burton, on July 20, 2005. Defendant admitted that he entered a dwelling by breaking the glass out of a basement window, and then left the house with some jewelry and a pocketknife he had taken from the premises. Defendant also admitted that he satisfied the requirements for the status of a third habitual offender.

The trial court initially delayed sentencing so that defendant might avail himself of treatment for his substance abuse problems as offered by the Salvation Army. On the day scheduled for sentencing, however, defendant failed to appear, and it came to the court's attention that defendant had absconded from the program. The court issued a bench warrant for him. When sentencing did take place, nearly a month later, it came to the court's attention that defendant had been charged with armed robbery, assault with intent to do great bodily harm less than murder, and carjacking, in the interim.

On appeal, defendant challenges his sentence on the grounds that the trial court erroneously scored one of the sentencing variables, that the court lacked valid reasons for departing from the guidelines, and that the resulting sentence constitutes cruel and unusual punishment.

II. Prior Record Variable 5

Defendant argues that the trial court erred in assessing five points in connection with prior record variable (PRV) 5. “This Court reviews a sentencing court’s scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, to the extent that a scoring issue calls for statutory interpretation, review is de novo. *Id.*

Prior record variable 5 concerns earlier misdemeanors, in the form of criminal convictions or juvenile adjudications. MCL 777.55(1). MCR 777.55(2)(a) limits misdemeanors or adjudications to be counted to those stemming from offenses against a person or property, concerning controlled substances, or weapons, to which MCL 777.55(2)(b) adds offenses involving operation of a vehicle under the influence of controlled substances or alcohol. MCL 777.55(1)(d) prescribes five points for two such convictions or adjudications.

In this case, one of the two misdemeanors listed in defendant’s presentence investigation report is a conviction of operating a motor vehicle while impaired, which drew a sentence of jail plus probation, from which he was discharged only after numerous violations. Citing MCL 777.55(2)(a), defendant protests that this traffic offense, not being a crime against a person or property, or otherwise coming under that subsection, should not qualify. However, defendant overlooks MCL 777.55(2)(b), which expressly adds traffic offenses involving operating while impaired by alcohol or controlled substances. Because the statute, by its plain terms, indicates that the traffic offense of which defendant makes issue is among those to be counted for purposes of PRV 5, defendant fails to show that the trial court erred in assessing the five points for that variable.

III. Departure

The recommended range for defendant’s minimum sentence under the sentencing guidelines was 29 to 85 months’ imprisonment. The minimum term actually imposed, 20 years, or 240 months, thus constitutes a significant upward departure.

In reviewing a trial court’s decision whether to depart from the recommended range under the guidelines, “whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion” *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). An abuse of discretion occurs where the trial court chooses an outcome falling outside a “principled range of outcomes.” *Id.* at 269.

A sentencing court departing from the guidelines must state on the record its reasons for the departure, and may deviate for only a “substantial and compelling reason” MCL

769.34(3), see also *Babcock*, *supra* at 255-256, 272. This legislative language, in light of its statutory and caselaw history, indicates the legislative intent that deviations from sentencing recommendations follow from only objective and verifiable factors. *Id.* at 257-258, 272.

The trial court stated that it originally contemplated a five-year minimum sentence, but that because defendant “ran” from the court and the Salvation Army, the contemplated minimum went to seven years, and that with the additional criminal activity, “I don’t think anything less than 20 to 30 is in line.” The court elaborated in preparing a written departure evaluation form:

The defendant was released to the custody of the Salvation Army . . . to attend programming there on a personal recognizance bond. Defendant appeared for sentencing on Oct. 25, 2005 without anyone from the Salvation Army. The court adjourned the matter to the 26th (next day) so that a Salvation Army representative could appear. Defendant failed to return on the 26th and a bench warrant was issued. A representative from the Salvation Army did appear on the 26th and related that the defendant was A.W.O.L. (absent w/out official leave). Defendant was arrested on new charges on November 8th The allegations contained in the new complaint involved the use of a weapon (defendant is a felon), a car jacking, and serious injury to a senior citizen. The court originally was interested in determining if defendant could be rehabilitated through the Salvation Army program[,] however defendant, through his activities, lost this opportunity. In addition, the court then considered the high end of the guidelines (85 months) but because of the defendant’s callous behavior and demonstrations of lack of feeling for others and selfish, unrestrained self gratification and the fact that he is a convicted felon the sentence of 240 months to 360 months^[1] was imposed.

We agree with the trial court that defendant’s failure to appear in court, and disappearance from the Salvation Army program, coupled with the indications that he had engaged in further felonious conduct, boded ill for defendant’s prospects for taking advantage of rehabilitative services. But the court’s other reasons for departing do not pass muster.

A substantial and compelling reason for a departure is one that “‘keenly” or “‘irresistibly” grabs our attention””; is ‘of “considerable worth” in deciding the length of a sentence’; and ‘exists only in exceptional cases.’” *Babcock*, *supra* at 257-258, quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). “A court shall not base a departure on an offense characteristic or offender characteristic already taken into account . . . unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b). That defendant was a convicted felon does not grab our attention as presenting any exceptional circumstance. Further, defendant’s criminal history was taken into account in the

¹ We note that this is the harshest sentence available for second-degree home invasion, as committed by a third habitual offender, and thus should be imposed only for the most serious or life-threatening class of that crime. See *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990).

scoring of the guidelines, and the trial court offered no reason why that process gave that history inadequate weight. Moreover, if defendant is found guilty of the additional felonious conduct with which he was charged while awaiting sentencing in this case, we are confident that the criminal justice system will penalize him appropriately.

An objective and verifiable factor is one that is “external to the minds of the judge, defendant, and others involved in making the decision,” and “capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Defendant’s selfishness and lack of feeling for others is not external to the minds of defendant and the sentencing court, and thus is not objective and verifiable.

Where a trial court explains a sentencing departure in reference to both valid and invalid factors, and this Court cannot determine whether the court would have arrived at the same result solely on the basis of the valid ones, this Court “must remand the case to the trial court for resentencing or rearticulation of its substantial and compelling reasons to justify its departure.” *Babcock, supra* at 260-261. In this case, we cannot determine whether the trial court would have imposed the nearly two-fold upward departure from the recommended range for defendant’s minimum sentence under the guidelines had the court not relied in part on invalid factors. Accordingly, we hereby vacate defendant’s sentence, and remand this case to the trial court for resentencing.

IV. Cruel and Unusual Punishment

Defendant also argues that his sentence constituted unconstitutionally cruel and unusual punishment. See US Const, Am VIII; Const 1963, art 1, § 16. In light of our disposition of this case, we need not reach this argument.

Vacated and remanded for further proceedings. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski